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**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA – OAKLAND DIVISION**

AURIS HEALTH, INC. AND VERB SURGICAL,  
INC.,

Plaintiffs,

v.

KALPITKUMAR GAJERA,

Defendant.

Case No. 4:21-cv-5337-HSG

[Assigned to Hon. Haywood S. Gilliam, Jr.]

**ORDER AND JOINT STIPULATION  
FOR PROTECTIVE ORDER**

Complaint Filed: July 12, 2021

It is hereby stipulated to and agreed by and between Plaintiffs Auris Health, Inc., and Verb Surgical, Inc., and Defendant Kalpitkumar Gajera (individually, a “Party,” or collectively, the “Parties”):

**I. PURPOSES AND LIMITATIONS**

Disclosure and discovery activity in this action are likely to involve production of confidential, proprietary, or private information for which special protection from public disclosure

and from use for any purpose other than prosecuting or defending this litigation may be warranted. Accordingly, the parties hereby stipulate to and petition the court to enter the following Stipulated Protective Order. The parties acknowledge that the protection this Order affords from public disclosure and use extends only to the limited information or items that are entitled to confidential treatment under the applicable legal principles. The parties further acknowledge, as set forth in section 13.4, below, that this Stipulated Protective Order does not entitle them to file confidential information under seal; Civil Local Rule 79-5 sets forth the procedures that must be followed and the standards that will be applied when a party seeks permission from the court to file material under seal.

## **II. DEFINITIONS**

2.1 Challenging Party: a Party or Non-Party that challenges the designation of information or items under this Order.

2.2 “CONFIDENTIAL” Information or Items: information (regardless of how it is generated, stored or maintained) or tangible things that qualify for protection under Federal Rule of Civil Procedure 26(c).

2.3 Counsel (without qualifier): Outside Counsel of Record and House Counsel (as well as their support staff).

2.4 Designating Party: a Party or Non-Party that designates information or items that it produces in disclosures or in responses to discovery as “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” or “HIGHLY CONFIDENTIAL – SOURCE CODE.”

2.5 Disclosure or Discovery Material: all items or information, regardless of the medium or manner in which it is generated, stored, or maintained (including, among other things, testimony, transcripts, and tangible things), that are produced or generated in disclosures or responses to discovery in this matter.

2.6 Expert: a person with specialized knowledge or experience in a matter pertinent to the litigation who (1) has been retained by a Party or its counsel to serve as an expert witness or as a

consultant in this action, (2) is not a past or current employee of a Party or of a Party's competitor, and (3) at the time of retention, is not anticipated to become an employee of a Party or of a Party's competitor.

2.7 "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" Information or Items: extremely sensitive "Confidential Information or Items," disclosure of which to another Party or Non-Party would create a substantial risk of serious harm that could not be avoided by less restrictive means.

2.8 "HIGHLY CONFIDENTIAL – SOURCE CODE" Information or Items: extremely sensitive "Confidential Information or Items" representing computer code and associated comments and revision histories, formulas, engineering specifications, or schematics that define or otherwise describe in detail the algorithms or structure of software or hardware designs, disclosure of which to another Party or Non-Party would create a substantial risk of serious harm that could not be avoided by less restrictive means.

2.9 House Counsel: attorneys who are employees of a Party to this action. House Counsel does not include Outside Counsel of Record or any other outside counsel.

2.10 Non-Party: any natural person, partnership, corporation, association, or other legal entity not named as a Party to this action.

2.11 Outside Counsel of Record: attorneys who are not employees of a party to this action but are retained to represent or advise a party to this action and have appeared in this action on behalf of that party or are affiliated with a law firm which has appeared on behalf of that party.

2.12 Party: any party to this action, including all of its officers, directors, employees, consultants, retained experts, and Outside Counsel of Record (and their support staffs).

2.13 Producing Party: a Party or Non-Party that produces Disclosure or Discovery Material in this action.

2.14 Professional Vendors: persons or entities that provide litigation support services (e.g., photocopying, videotaping, translating, preparing exhibits or demonstrations, and organizing, storing, or retrieving data in any form or medium) and their employees and subcontractors.

1           2.15 Protected Material: any Disclosure or Discovery Material that is designated as  
2 “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” or as  
3 “HIGHLY CONFIDENTIAL – SOURCE CODE.”

4           2.16 Receiving Party: a Party that receives Disclosure or Discovery Material from a  
5 Producing Party.

### 6 **III. SCOPE**

7           The protections conferred by this Stipulation and Order cover not only Protected Material  
8 (as defined above), but also (1) any information copied or extracted from Protected Material; (2) all  
9 copies, excerpts, summaries, or compilations of Protected Material; and (3) any testimony,  
10 conversations, or presentations by Parties or their Counsel that might reveal Protected Material.  
11 However, the protections conferred by this Stipulation and Order do not cover the following  
12 information: (a) any information that is in the public domain at the time of disclosure to a Receiving  
13 Party or becomes part of the public domain after its disclosure to a Receiving Party as a result of  
14 publication not involving a violation of this Order, including becoming part of the public record  
15 through trial or otherwise; and (b) any information known to the Receiving Party prior to the  
16 disclosure or obtained by the Receiving Party after the disclosure from a source who obtained the  
17 information lawfully and under no obligation of confidentiality to the Designating Party. Any use  
18 of Protected Material at trial shall be governed by a separate agreement or order.

### 19 **IV. DURATION**

20           Even after final disposition of this litigation, the confidentiality obligations imposed by this  
21 Order shall remain in effect until a Designating Party agrees otherwise in writing or a court order  
22 otherwise directs. Final disposition shall be deemed to be the later of (1) dismissal of all claims and  
23 defenses in this action, with or without prejudice; and (2) final judgment herein after the completion  
24 and exhaustion of all appeals, rehearings, remands, trials, or reviews of this action, including the  
25 time limits for filing any motions or applications for extension of time pursuant to applicable law.  
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**V. DESIGNATING PROTECTED MATERIAL**

5.1 Exercise of Restraint and Care in Designating Material for Protection. Each Party or Non-Party that designates information or items for protection under this Order must take care to limit any such designation to specific material that qualifies under the appropriate standards. To the extent it is practical to do so, the Designating Party must designate for protection only those parts of material, documents, items, or oral or written communications that qualify – so that other portions of the material, documents, items, or communications for which protection is not warranted are not swept unjustifiably within the ambit of this Order.

Mass, indiscriminate, or routinized designations are prohibited. Designations that are shown to be clearly unjustified or that have been made for an improper purpose (e.g., to unnecessarily encumber or retard the case development process or to impose unnecessary expenses and burdens on other parties) expose the Designating Party to sanctions.

If it comes to a Designating Party's attention that information or items that it designated for protection do not qualify for protection at all or do not qualify for the level of protection initially asserted, that Designating Party must promptly notify all other parties that it is withdrawing the mistaken designation.

5.2 Manner and Timing of Designations. Except as otherwise provided in this Order (see, e.g., second paragraph of section 5.2(a) below), or as otherwise stipulated or ordered, Disclosure or Discovery Material that qualifies for protection under this Order must be clearly so designated before the material is disclosed or produced.

Designation in conformity with this Order requires:

(a) for information in documentary form (e.g., paper or electronic documents, but excluding transcripts of depositions or other pretrial or trial proceedings), that the Producing Party affix the legend "CONFIDENTIAL," "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY," or "HIGHLY CONFIDENTIAL – SOURCE CODE" to each page that contains protected material. If only a portion or portions of the material on a page qualifies for protection, the Producing Party also

1 must clearly identify the protected portion(s) (e.g., by making appropriate markings in the margins)  
2 and must specify, for each portion, the level of protection being asserted.

3 A Party or Non-Party that makes original documents or materials available for inspection  
4 need not designate them for protection until after the inspecting Party has indicated which material  
5 it would like copied and produced. During the inspection and before the designation, all of the  
6 material made available for inspection shall be deemed “HIGHLY CONFIDENTIAL –  
7 ATTORNEYS’ EYES ONLY.” After the inspecting Party has identified the documents it wants  
8 copied and produced, the Producing Party must determine which documents, or portions thereof,  
9 qualify for protection under this Order. Then, before producing the specified documents, the  
10 Producing Party must affix the appropriate legend (“CONFIDENTIAL,” “HIGHLY  
11 CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” or “HIGHLY CONFIDENTIAL – SOURCE  
12 CODE) to each page that contains Protected Material. If only a portion or portions of the material  
13 on a page qualifies for protection, the Producing Party also must clearly identify the protected  
14 portion(s) (e.g., by making appropriate markings in the margins) and must specify, for each portion,  
15 the level of protection being asserted.

16 (b) for testimony given in deposition or in other pretrial or trial proceedings, that the  
17 Designating Party identify on the record, before the close of the deposition, hearing, or other  
18 proceeding, all protected testimony and specify the level of protection being asserted. When it is  
19 impractical to identify separately each portion of testimony that is entitled to protection and it  
20 appears that substantial portions of the testimony may qualify for protection, the Designating Party  
21 may invoke on the record (before the deposition, hearing, or other proceeding is concluded) a right  
22 to have up to 21 days to identify the specific portions of the testimony as to which protection is  
23 sought and to specify the level of protection being asserted. Only those portions of the testimony  
24 that are appropriately designated for protection within the 21 days shall be covered by the provisions  
25 of this Stipulated Protective Order. Alternatively, a Designating Party may specify, at the deposition  
26 or up to 21 days afterwards if that period is properly invoked, that the entire transcript shall be  
27 treated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.”  
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Parties shall give the other parties notice if they reasonably expect a deposition, hearing or other proceeding to include Protected Material so that the other Parties can ensure that only authorized individuals who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A) are present at those proceedings. The use of a document as an exhibit at a deposition shall not in any way affect its designation as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.”

Transcripts containing Protected Material shall have an obvious legend on the title page that the transcript contains Protected Material, and the title page shall be followed by a list of all pages (including line numbers as appropriate) that have been designated as Protected Material and the level of protection being asserted by the Designating Party. The Designating Party shall inform the court reporter of these requirements. Any transcript that is prepared before the expiration of a 21-day period for designation shall be treated during that period as if it had been designated “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” in its entirety unless otherwise agreed. After the expiration of that period, the transcript shall be treated only as actually designated.

(c) for information produced in some form other than documentary and for any other tangible items, that the Producing Party affix in a prominent place on the exterior of the container or containers in which the information or item is stored the legend “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” or “HIGHLY CONFIDENTIAL – SOURCE CODE.” If only a portion or portions of the information or item warrant protection, the Producing Party, to the extent practicable, shall identify the protected portion(s) and specify the level of protection being asserted.

5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to designate qualified information or items does not, standing alone, waive the Designating Party’s right to secure protection under this Order for such material. Upon timely correction of a designation, the Receiving Party must make reasonable efforts to assure that the material is treated in accordance with the provisions of this Order.

## VI. CHALLENGING CONFIDENTIALITY DESIGNATIONS

6.1 Timing of Challenges. Any Party or Non-Party may challenge a designation of confidentiality at any time. Unless a prompt challenge to a Designating Party's confidentiality designation is necessary to avoid foreseeable, substantial unfairness, unnecessary economic burdens, or a significant disruption or delay of the litigation, a Party does not waive its right to challenge a confidentiality designation by electing not to mount a challenge promptly after the original designation is disclosed.

6.2 Meet and Confer. The Challenging Party shall initiate the dispute resolution process by providing written notice of each designation it is challenging and describing the basis for each challenge. To avoid ambiguity as to whether a challenge has been made, the written notice must recite that the challenge to confidentiality is being made in accordance with this specific paragraph of the Protective Order. The parties shall attempt to resolve each challenge in good faith and must begin the process by conferring directly (in voice to voice dialogue; other forms of communication are not sufficient) within 14 days of the date of service of notice. In conferring, the Challenging Party must explain the basis for its belief that the confidentiality designation was not proper and must give the Designating Party an opportunity to review the designated material, to reconsider the circumstances, and, if no change in designation is offered, to explain the basis for the chosen designation. A Challenging Party may proceed to the next stage of the challenge process only if it has engaged in this meet and confer process first or establishes that the Designating Party is unwilling to participate in the meet and confer process in a timely manner.

6.3 Judicial Intervention. If the Parties cannot resolve a challenge without court intervention, the Designating Party shall file and serve a motion to retain confidentiality under Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5, if applicable) within 21 days of the initial notice of challenge or within 14 days of the parties agreeing that the meet and confer process will not resolve their dispute, whichever is earlier. Each such motion must be accompanied by a competent declaration affirming that the movant has complied with the meet and confer requirements imposed in the preceding paragraph. Failure by the Designating Party to make such a



1 motion including the required declaration within 21 days (or 14 days, if applicable) shall  
 2 automatically waive the confidentiality designation for each challenged designation. In addition, the  
 3 Challenging Party may file a motion challenging a confidentiality designation at any time if there is  
 4 good cause for doing so, including a challenge to the designation of a deposition transcript or any  
 5 portions thereof. Any motion brought pursuant to this provision must be accompanied by a  
 6 competent declaration affirming that the movant has complied with the meet and confer  
 7 requirements imposed by the preceding paragraph.

8 The burden of persuasion in any such challenge proceeding shall be on the Designating  
 9 Party. Frivolous challenges and those made for an improper purpose (e.g., to harass or impose  
 10 unnecessary expenses and burdens on other parties) may expose the Challenging Party to sanctions.  
 11 Unless the Designating Party has waived the confidentiality designation by failing to file a motion  
 12 to retain confidentiality as described above, all parties shall continue to afford the material in  
 13 question the level of protection to which it is entitled under the Producing Party's designation until  
 14 the court rules on the challenge.

## 15 **VII. ACCESS TO AND USE OF PROTECTED MATERIAL**

16 7.1 Basic Principles. A Receiving Party may use Protected Material that is disclosed or  
 17 produced by another Party or produced by a Non-Party in connection with this case only for  
 18 prosecuting, defending, or attempting to settle this litigation. Such Protected Material may be  
 19 disclosed only to the categories of persons and under the conditions described in this Order. It is  
 20 expressly acknowledged and agreed that Non-Parties are not entitled to access Protected Material  
 21 under any circumstances, regardless of any agreement or understanding between any Party and Non-  
 22 Parties regarding the sharing of information under a common interest privileged or joint defense  
 23 agreement. To be clear, Protected Material designated under this Order may not be shared with any  
 24 Non-Party. When the litigation has been terminated, a Receiving Party must comply with the  
 25 provisions of part XIV below regarding Final Disposition.

26 Protected Material must be stored and maintained by a Receiving Party at a location and in  
 27 a secure manner that ensures that access is limited to the persons authorized under this Order.  
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1 Additionally, electronic Protected Material must be stored and maintained by a Receiving Party in  
2 password-protected form.

3 7.2 Disclosure of “CONFIDENTIAL” Information or Items. Unless otherwise ordered by  
4 the court or permitted in writing by the Designating Party, a Receiving Party may disclose any  
5 information or item designated “CONFIDENTIAL” only to:

6 (a) the Receiving Party;

7 (b) the Receiving Party’s Outside Counsel of Record in this action, as well as employees of  
8 said Outside Counsel of Record to whom it is reasonably necessary to disclose the information for  
9 this litigation and who have signed the “Acknowledgment and Agreement to Be Bound” that is  
10 attached hereto as Exhibit A;

11 (c) the officers, directors, and employees (including House Counsel) of the Receiving Party  
12 to whom disclosure is reasonably necessary for this litigation and who have signed the  
13 “Acknowledgment and Agreement to Be Bound” (Exhibit A);

14 (d) Experts (as defined in this Order) of the Receiving Party to whom disclosure is  
15 reasonably necessary for this litigation and who have signed the “Acknowledgment and Agreement  
16 to Be Bound” (Exhibit A);

17 (e) the court and its personnel;

18 (f) court reporters and their staff, professional jury or trial consultants, and Professional  
19 Vendors to whom disclosure is reasonably necessary for this litigation and who have signed the  
20 “Acknowledgment and Agreement to Be Bound” (Exhibit A);

21 (g) during their depositions, witnesses in the action to whom disclosure is reasonably  
22 necessary and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A),  
23 unless otherwise agreed by the Designating Party or ordered by the court. Pages of transcribed  
24 deposition testimony or exhibits to depositions that reveal Protected Material must be separately  
25 bound by the court reporter and may not be disclosed to anyone except as permitted under this  
26 Stipulated Protective Order; and

1 (h) the author or recipient of a document containing the information or a custodian or other  
2 person who otherwise possessed or knew the information.

3 7.3 Disclosure of “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” and  
4 “HIGHLY CONFIDENTIAL – SOURCE CODE” Information or Items. Unless otherwise ordered  
5 by the court or permitted in writing by the Designating Party, a Receiving Party may disclose any  
6 information or item designated “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or  
7 “HIGHLY CONFIDENTIAL – SOURCE CODE” only to:

8 (a) the Receiving Party, if it is reasonably necessary to disclose the information for this  
9 litigation;

10 (b) the Receiving Party’s Outside Counsel of Record in this action, as well as employees of  
11 said Outside Counsel of Record to whom it is reasonably necessary to disclose the information for  
12 this litigation and who have signed the “Acknowledgment and Agreement to Be Bound” that is  
13 attached hereto as Exhibit A;

14 (c) Experts of the Receiving Party (1) to whom disclosure is reasonably necessary for this  
15 litigation, (2) who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A),  
16 and (3) as to whom the procedures set forth in paragraph 7.4(a)(2), below, have been followed;

17 (d) the court and its personnel;

18 (e) court reporters and their staff, professional jury or trial consultants, and Professional  
19 Vendors to whom disclosure is reasonably necessary for this litigation and who have signed the  
20 “Acknowledgment and Agreement to Be Bound” (Exhibit A); and

21 (f) the author or recipient of a document containing the information or a custodian or other  
22 person who otherwise possessed or knew the information.

23 7.4 Procedures for Approving or Objecting to Disclosure of “HIGHLY CONFIDENTIAL –  
24 ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL – SOURCE CODE” Information  
25 or Items to Experts.

26 (a) Unless otherwise ordered by the court or agreed to in writing by the Designating Party,  
27 a Party that seeks to disclose to an Expert (as defined in this Order) any information or item that has  
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1 been designated “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or “HIGHLY  
 2 CONFIDENTIAL – SOURCE CODE” pursuant to paragraph 7.3(b) first must make a written  
 3 request to the Designating Party that (1) identifies the general categories of “HIGHLY  
 4 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL – SOURCE  
 5 CODE” information that the Receiving Party seeks permission to disclose to the Expert, (2) sets  
 6 forth the full name of the Expert and the city and state of his or her primary residence, (3) attaches  
 7 a copy of the Expert’s current resume, (4) identifies the Expert’s current employer(s), (5) identifies  
 8 each person or entity from whom the Expert has received compensation or funding for work in his  
 9 or her areas of expertise or to whom the expert has provided professional services, including in  
 10 connection with a litigation, at any time during the preceding five years,<sup>1</sup> and (6) identifies (by name  
 11 and number of the case, filing date, and location of court) any litigation in connection with which  
 12 the Expert has offered expert testimony, including through a declaration, report, or testimony at a  
 13 deposition or trial, during the preceding five years.

14 (b) A Party that makes a request and provides the information specified in the preceding  
 15 paragraph may disclose the subject Protected Material to the identified Expert unless, within 14  
 16 days of delivering the request, the Party receives a written objection from the Designating Party.  
 17 Any such objection must set forth in detail the grounds on which it is based.

18 (c) A Party that receives a timely written objection must meet and confer with the  
 19 Designating Party (through direct voice to voice dialogue) to try to resolve the matter by agreement  
 20 within seven days of the written objection. If no agreement is reached, the Party seeking to make  
 21 the disclosure to the Expert may file a motion as provided in Civil Local Rule 7 (and in compliance  
 22 with Civil Local Rule 79-5, if applicable) seeking permission from the court to do so. Any such  
 23 motion must describe the circumstances with specificity, set forth in detail the reasons why the  
 24 disclosure to the Expert is reasonably necessary, assess the risk of harm that the disclosure would  
 25 entail, and suggest any additional means that could be used to reduce that risk. In addition, any such

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26 <sup>1</sup> If the Expert believes any of this information is subject to a confidentiality obligation to a third-party, then the  
 27 Expert should provide whatever information the Expert believes can be disclosed without violating any confidentiality  
 28 agreements, and the Party seeking to disclose to the Expert shall be available to meet and confer with the Designating  
 Party regarding any such engagement.

1 motion must be accompanied by a competent declaration describing the parties' efforts to resolve  
 2 the matter by agreement (i.e., the extent and the content of the meet and confer discussions) and  
 3 setting forth the reasons advanced by the Designating Party for its refusal to approve the disclosure.

4 In any such proceeding, the Party opposing disclosure to the Expert shall bear the burden of  
 5 proving that the risk of harm that the disclosure would entail (under the safeguards proposed)  
 6 outweighs the Receiving Party's need to disclose the Protected Material to its Expert.

### 7 **VIII. SOURCE CODE**

8 (a) To the extent production of source code becomes necessary in this case, a Producing  
 9 Party may designate source code as "HIGHLY CONFIDENTIAL - SOURCE CODE" if it  
 10 comprises or includes confidential, proprietary or trade secret source code.

11 (b) Protected Material designated as "HIGHLY CONFIDENTIAL – SOURCE CODE"  
 12 shall be subject to all of the protections afforded to "HIGHLY CONFIDENTIAL – SOURCE  
 13 CODE," shall be subject to all of the protections afforded to "HIGHLY CONFIDENTIAL –  
 14 ATTORNEYS' EYES ONLY" information, and may be disclosed only to the individuals to whom  
 15 "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" information may be disclosed, as  
 16 set forth in Paragraphs 7.3 and 7.4.

17 (c) Any source code produced in discovery shall be made available for inspection, in a  
 18 format allowing it to be reasonably reviewed and searched, during normal business hours or at other  
 19 mutually agreeable times, at an office of the Producing Party's counsel or another mutually agreed  
 20 upon location. The source code shall be made available for inspection on a secured computer in a  
 21 secured room without Internet access or network access to other computers, and the Receiving Party  
 22 shall not copy, remove, or otherwise transfer any portion of the source code onto any recordable  
 23 media or recordable device. The Producing Party may visually monitor the activities of the  
 24 Receiving Party's representatives during any source code review, but only to ensure that there is no  
 25 unauthorized recording, copying, or transmission of the source code.

26 (d) The Receiving Party may request paper copies of limited portions of source code that  
 27 are reasonably necessary for the preparation of court filings, pleadings, expert reports, or other  
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1 papers, or for deposition or trial, but shall not request paper copies for the purposes of reviewing  
 2 the source code other than electronically as set forth in paragraph (c) in the first instance. The  
 3 Producing Party shall provide all such source code in paper form including bates numbers and the  
 4 label “HIGHLY CONFIDENTIAL - SOURCE CODE.” The Producing Party may challenge the  
 5 amount of source code requested in hard copy form pursuant to the dispute resolution procedure and  
 6 timeframes set forth in Paragraph 6 whereby the Producing Party is the “Challenging Party” and the  
 7 Receiving Party is the “Designating Party” for purposes of dispute resolution.

8 (e) The Receiving Party shall maintain a record of any individual who has inspected any  
 9 portion of the source code in electronic or paper form. The Receiving Party shall maintain all paper  
 10 copies of any printed portions of the source code in a secured, locked area. The Receiving Party  
 11 shall not create any electronic or other images of the paper copies and shall not convert any of the  
 12 information contained in the paper copies into any electronic format. The Receiving Party shall only  
 13 make additional paper copies if such additional copies are (1) necessary to prepare court filings,  
 14 pleadings, or other papers (including a testifying expert’s expert report), (2) necessary for  
 15 deposition, or (3) otherwise necessary for the preparation of its case. Any paper copies used during  
 16 a deposition shall be retrieved by the Producing Party at the end of each day and must not be given  
 17 to or left with a court reporter or any other unauthorized individual.<sup>2</sup>

# **IX. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER LITIGATION**

20 If a Party is served with a subpoena or a court order issued in other litigation that compels  
 21 disclosure of any information or items designated in this action as “CONFIDENTIAL,” “HIGHLY  
 22 CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” or “HIGHLY CONFIDENTIAL – SOURCE  
 23 CODE,” that Party must:

24 (a) promptly notify in writing the Designating Party. Such notification shall include a copy  
 25 of the subpoena or court order;

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26 <sup>2</sup> The nature of the source code at issue in a particular case may warrant additional protections or restrictions, For  
 27 example, it may be appropriate under certain circumstances to require the Receiving Party to provide notice to the  
 28 Producing Party before including “HIGHLY CONFIDENTIAL – SOURCE CODE” information in a court filing,  
 pleading, or expert report.

(b) promptly notify in writing the party who caused the subpoena or order to issue in the other litigation that some or all of the material covered by the subpoena or order is subject to this Protective Order. Such notification shall include a copy of this Stipulated Protective Order; and

(c) cooperate with respect to all reasonable procedures sought to be pursued by the Designating Party whose Protected Material may be affected.<sup>3</sup>

If the Designating Party timely seeks a protective order, the Party served with the subpoena or court order shall not produce any information designated in this action as “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” or “HIGHLY CONFIDENTIAL – SOURCE CODE” before a determination by the court from which the subpoena or order issued, unless the Party has obtained the Designating Party’s permission. The Designating Party shall bear the burden and expense of seeking protection in that court of its confidential material – and nothing in these provisions should be construed as authorizing or encouraging a Receiving Party in this action to disobey a lawful directive from another court.

#### **X. A NON-PARTY’S PROTECTED MATERIAL SOUGHT TO BE PRODUCED IN THIS LITIGATION**

(a) The terms of this Order are applicable to information produced by a Non-Party in this action and designated as “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” or “HIGHLY CONFIDENTIAL – SOURCE CODE.” Such information produced by Non-Parties in connection with this litigation is protected by the remedies and relief provided by this Order. Nothing in these provisions should be construed as prohibiting a Non-Party from seeking additional protections.

(b) In the event that a Party is required, by a valid discovery request, to produce a Non-Party’s confidential information in its possession, and the Party is subject to an agreement with the Non-Party not to produce the Non-Party’s confidential information, then the Party shall:

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<sup>3</sup> The purpose of imposing these duties is to alert the interested parties to the existence of this Protective Order and to afford the Designating Party in this case an opportunity to try to protect its confidentiality interests in the court from which the subpoena or order issued.



1. promptly notify in writing the Requesting Party and the Non-Party that some or all of the information requested is subject to a confidentiality agreement with a Non-Party;
2. promptly provide the Non-Party with a copy of the Stipulated Protective Order in this litigation, the relevant discovery request(s), and a reasonably specific description of the information requested; and
3. make the information requested available for inspection by the Non-Party.

(c) If the Non-Party fails to object or seek a protective order from this court within 14 days of receiving the notice and accompanying information, the Receiving Party may produce the Non-Party's confidential information responsive to the discovery request. If the Non-Party timely seeks a protective order, the Receiving Party shall not produce any information in its possession or control that is subject to the confidentiality agreement with the Non-Party before a determination by the court.<sup>4</sup> Absent a court order to the contrary, the Non-Party shall bear the burden and expense of seeking protection in this court of its Protected Material.

#### **XI. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL**

If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected Material to any person or in any circumstance not authorized under this Stipulated Protective Order, the Receiving Party must immediately (a) notify in writing the Designating Party of the unauthorized disclosures, (b) use its best efforts to retrieve all unauthorized copies of the Protected Material, (c) inform the person or persons to whom unauthorized disclosures were made of all the terms of this Order, and (d) request such person or persons to execute the "Acknowledgment and Agreement to Be Bound" that is attached hereto as Exhibit A.

#### **XII. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED MATERIAL**

When a Producing Party gives notice to Receiving Parties that certain inadvertently produced material is subject to a claim of privilege or other protection, the obligations of the Receiving Parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B). This provision

<sup>4</sup> The purpose of this provision is to alert the interested parties to the existence of confidentiality rights of a Non-Party and to afford the Non-Party an opportunity to protect its confidentiality interests in this court.



1 is not intended to modify whatever procedure may be established in an e-discovery order that  
2 provides for production without prior privilege review. Pursuant to Federal Rule of Evidence 502(d)  
3 and (e), insofar as the parties reach an agreement on the effect of disclosure of a communication or  
4 information covered by the attorney-client privilege or work product protection, the parties may  
5 incorporate their agreement in the stipulated protective order submitted to the court.

### 6 **XIII. MISCELLANEOUS**

7 13.1 Right to Further Relief. Nothing in this Order abridges the right of any person to seek  
8 its modification by the court in the future.

9 13.2 Right to Assert Other Objections. By stipulating to the entry of this Protective Order  
10 no Party waives any right it otherwise would have to object to disclosing or producing any  
11 information or item on any ground not addressed in this Stipulated Protective Order. Similarly, no  
12 Party waives any right to object on any ground to use in evidence of any of the material covered by  
13 this Protective Order.

14 13.3 Export Control. Disclosure of Protected Material shall be subject to all applicable laws  
15 and regulations relating to the export of technical data contained in such Protected Material,  
16 including the release of such technical data to foreign persons or nationals in the United States or  
17 elsewhere. The Producing Party shall be responsible for identifying any such controlled technical  
18 data, and the Receiving Party shall take measures necessary to ensure compliance.

19 13.4 Filing Protected Material. Without written permission from the Designating Party or  
20 a court order secured after appropriate notice to all interested persons, a Party may not file in the  
21 public record in this action any Protected Material. A Party that seeks to file under seal any Protected  
22 Material must comply with Civil Local Rule 79-5. Protected Material may only be filed under seal  
23 pursuant to a court order authorizing the sealing of the specific Protected Material at issue. Pursuant  
24 to Civil Local Rule 79-5, a sealing order will issue only upon a request establishing that the Protected  
25 Material at issue is privileged, protectable as a trade secret, or otherwise entitled to protection under  
26 the law. If a Receiving Party's request to file Protected Material under seal pursuant to Civil Local  
27  
28

1 Rule 79-5 is denied by the court, then the Receiving Party may file the Protected Material in the  
2 public record pursuant to Civil Local Rule 79-5 unless otherwise instructed by the court.

3 **XIV. FINAL DISPOSITION**

4 Within 60 days after the final disposition of this action, as defined in paragraph 4, each  
5 Receiving Party must return all Protected Material to the Producing Party or destroy such material.  
6 As used in this subdivision, “all Protected Material” includes all copies, abstracts, compilations,  
7 summaries, and any other format reproducing or capturing any of the Protected Material. Whether  
8 the Protected Material is returned or destroyed, the Receiving Party must submit a written  
9 certification to the Producing Party (and, if not the same person or entity, to the Designating Party)  
10 by the 60-day deadline that (1) identifies (by category, where appropriate) all the Protected Material  
11 that was returned or destroyed and (2) affirms that the Receiving Party has not retained any copies,  
12 abstracts, compilations, summaries or any other format reproducing or capturing any of the  
13 Protected Material. Notwithstanding this provision, Counsel are entitled to retain an archival copy  
14 of all pleadings, motion papers, trial, deposition, and hearing transcripts, legal memoranda,  
15 correspondence, deposition and trial exhibits, expert reports, attorney work product, and consultant  
16 and expert work product, even if such materials contain Protected Material. Any such archival  
17 copies that contain or constitute Protected Material remain subject to this Protective Order as set  
18 forth above in part IV (DURATION).

19 **IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.**  
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27  
28

1 DATED: June 28, 2022

BLANK ROME LLP

2 By: /s/ Leigh Ann Buziak

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7 *Attorneys for Plaintiffs*

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8  
9 MOBILITY LEGAL P.C.

10 By: /s/ David R. Burt

11 David R. Burt

dburt@mobilitylegal.com

12 *Attorney for Defendant*

*Kalpikumar Gajera*

13  
14 **ECF ATTESTATION.** In accordance with Civil Local Rule 5-1(i)(3), I, Leigh Ann Buziak,  
15 attest that on June 21, 2022, I obtained concurrence in the filing of this document from the other  
16 signatory listed above.  
17

18 /s/ Leigh Ann Buziak

19 Leigh Ann Buziak

20 **PURSUANT TO STIPULATION IT IS SO ORDERED.**

21  
22 Dated: 6/29/2022

23 

Haywood S. Gilliam, Jr.

24 United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA – OAKLAND DIVISION

AURIS HEALTH, INC. AND VERB SURGICAL,  
INC.,

Plaintiffs,

v.

KALPITKUMAR GAJERA,

Defendant.

Case No. 4:21-cv-5337-HSG

[Assigned to Hon. Haywood S. Gilliam, Jr.]

**ENDORSEMENT OF PROTECTIVE  
ORDER**

Complaint Filed: July 12, 2021

**EXHIBIT A**

I, \_\_\_\_\_ (name), of \_\_\_\_\_  
(address), declare under penalty of perjury that I have read in its entirety and understand the  
Stipulated Protective Order that was issued by the United States District Court for the Northern  
District of California on \_\_\_\_\_ in the case of *Auris Health, Inc., et al. v. Kalpitkumar  
Gajera*, No. 4:21-cv-5337-HSG. I agree to comply with and to be bound by all the terms of this  
Stipulated Protective Order, and I understand and acknowledge that failure to so comply could  
expose me to sanctions and punishment in the nature of contempt. I solemnly promise that I will not  
disclose in any manner any information or item that is subject to this Stipulated Protective Order to  
any person or entity except in strict compliance with the provisions of this Order.

I further agree to submit to the jurisdiction of the United States District Court for the  
Northern District of California for the purpose of enforcing the terms of this Stipulated Protective  
Order, even if such enforcement proceedings occur after termination of this action.

I hereby appoint \_\_\_\_\_ (name), \_\_\_\_\_ (telephone number),  
of \_\_\_\_\_ (address), as my California agent for service  
of process in connection with this action or any proceedings related to enforcement of this Stipulated  
Protective Order.

Dated: \_\_\_\_\_

Signed: \_\_\_\_\_

City/State where sworn and signed: \_\_\_\_\_